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THE EUROPEAN COMMISSION PROPOSAL FOR A 3% “CALL RATE” AS A NEW SUGGESTION FOR A EUCIT: AN ASSESSMENT AGAINST THE CRITERIA FOR A FAIR TAXATION

By Luca Cerioni (*)

1. Introduction

In its draft EU budget for the period 2021-2027, the European Commission proposed to introduce a “basket of new Own Resources”, among which: “A 3% call rate applied to the new Common Consolidated Corporate Tax Base (to be phased in once the necessary legislation has been adopted)”¹. Under the Common Consolidated Corporate Tax Base project (CCCTB) proposed by the Commission² and backed with amendments by the European Parliament³, a project which has attracted a very wide literature⁴, multinational businesses having subsidiaries and branches in more jurisdiction throughout the EU would be able to determine their taxable base according to a uniform EU set of rules. This would also allow them to aggregate profits earned in any jurisdiction and to offset profits earned in a country and losses suffered in another country against each other (“consolidation” of the tax base), and the resulting common consolidated tax base would be shared among Member States according to an apportionment formula.

The prospect of a 3% “call rate”, applied to this proposed CCCTB, would lead to a *common* (however low) tax rate in addition to a *common* consolidated tax base, and it would require administration – related provisions. For this reason, this suggestion could in essence be regarded as a re-proposal of an idea which had been initially presented since 2001 in a Commission’s working paper on “Company Taxation in the Internal Market”⁵; specifically, the 3% “call rate” applied to the CCCTB could be regarded as a re-proposal of the idea for a European Union Company Income Tax (EUCIT) idea, even if *without* the “EUCIT” name⁶.

Accordingly, and for the purpose of assessing the merit of this Commission’s proposal, it appears appropriate to reconsider the EUCIT idea, although, according to academic views expressed in 2017, the Commission had previously refrained from considering it due to the high political sensitivity of the corporate taxation area⁷. In fact, the CCCTB was already

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¹ IP/ 1813570 Press Release, 02/05/2018

² COM(2016) 683 final, proposal for a Common Consolidated Corporate Tax Base (CCCTB); COM(2016)685 final, proposal for a Common Tax Base, 25 October 2016

³ European Parliament Legislative Resolution of 15.03.2018 on the proposal for a Council Directive on the Common Consolidated Corporate Tax Base, P8_TA-PROV(2018)0087

⁴ Among the many publications over the last decade, e.g., J.Barenfeld, A common consolidated corporate tax base in the European Union – a beauty or a beast in the quest for tax simplicity? Bulletin for International Taxation 6, 2007; M.Lang, P.Pistone, C.Schulz, C.Staringer (ed.), CCCTB Possible Contents of Community Law Provisions, Linde, 2008; D.Weber (ed.), CCCTB, Selected Issues, EUCOTAX Series 35, 2012; M.Lang, P.Pistone, J.Schuch, C.Staringer, A.Storch, Corporate Income Taxation in Europe The Common Consolidated Corporate Tax Base (CCCTB) and Third Countries, Edward Elgar, 2013; E.Traversa, Extra-Territorial Aspects of the CCCTB: The Beauty and the Beast? in “Les dialogues de la fiscalité- Anno 2012”- pp. 333- 367; D.Gutman & E.R de la Bletiere, CCCTB and International Taxation, in EC Tax Review 5, 2017, 233-245

⁵ Commission Staff Working Paper, SEC(2001)1681, Company Taxation in the Internal Market, Brussels 23.10.2001, at 377

⁶ As a result of this realization, in this contribution references to the “3% call rate” and to “EUCIT” will be used interchangeably.

⁷ B. Peeters, EUCIT: For How Much Longer Will Political Objections Outweigh the Advantages? EC Tax Review, 2015-3, 128-131, at 130

perceived, well before the latest proposal, as a key step towards an even longer term potential introduction of EUCIT⁸. This idea, after the initial suggestion in 2001, had been analysed again in the 2004 Commission's working paper on tax-based EU own resources⁹, which assessed a range of potential EU taxes – including EUCIT – by using budgetary criteria, efficiency criteria and equity criteria. These general criteria for assessment of any potential tax intended to be an EU own resource were also indicated in a 2014 report issued by the EU's High Level Group on Own Resources¹⁰. The Commission's working paper came to the overall conclusion that, whilst EUCIT could offer considerable benefits in terms of efficiency in the single market as regards the overcoming of remaining tax obstacles to cross-border activity, there would be numerous technical difficulties especially if the new tax was defined only for a specific group of companies (such as companies listed in a stock exchange, or meeting certain turnover thresholds)¹¹.

Against this background, and taking into account that the Commission's latest proposal for a 3% “call rate” is bound to meet opposition if it were to be perceived as unfair, this contribution intends assessing the proposal for a 3% “call rate” applied on the CCCTB against the commonly perceived benchmarks for a “fair taxation”. Given the wording of the Commission's proposal for the 3% call rate, which refer to the adoption of the necessary legislation for the CCCTB, the analysis will assume that the “3% call rate”, as (an anonymised) form of EUCIT, would co-exist with the CCCTB, by using it as a taxable base, instead of replacing the CCCTB itself (as it would have been the case if the suggestion initially submitted in 2001 had been implemented).

The assessment proposed in this contribution, intends offering inputs for a debate about another potential long-term development of EU legislation, in the direct taxation area too (such as the introduction of EUCIT), which, by increasing the EU's financial autonomy, may go - even more than the CCCTB - in the direction of allowing the relaunch and the consolidation of the EU project after the current, difficult historical phase.

2. The design of EUCIT as a “fair tax”: the benchmarks for “fairness” and underlying tax policy objectives

It was argued¹² that the EUCIT could be conceived either as a scheme addressed to multinational companies and applying alongside national rules or as a more general scheme applicable to all companies, that it could provide the EU a new “own resources”, that it would facilitate the achievement of the (anti-tax avoidance) goals set out by the OECD in the Action Plan against base erosion and profit shifting (BEPS)¹³, and, lastly, that it would prevent

⁸ European Commission, ‘Financing the EU budget: report on the operation of the own resources system’, 29 June 2011, at 39.

⁹ European Commission, Taxation Papers, P.Cattoir, *Tax-based EU own resources: An assessment*, working paper n. 1/2014.

¹⁰ High Level Group on Own Resources, First Assessment Report, Brussels, 17 December 2014, at 27-32.

¹¹ *Id.*, at 20.

¹² B. Peeters, *EUCIT: For How Much Longer Will Political Objections Outweigh the Advantages?* EC Tax Review, cit., at 129

¹³ OECD, *Action Plan on Base Erosion and Profit Shifting*, 2013, OECD Publishing.

Member States from using corporate income tax for tax competition amongst themselves. The two last outcomes would be interrelated: as it was highlighted, the tax avoidance strategies which have been causing revenue losses to Member States have found their scope in the differences between uncoordinated national tax systems in competition with each other¹⁴.

Although the Commission in its draft budget for 2021-2027 proposed a 3% “call rate” on the CCCTB only for the purpose of relaying on a new EU “own resource”, it could well be argued that – even if co-existing with national corporate tax rates - the 3% would also end up creating a constraint to the tax competition between Member States. In fact, the existence of a uniform, minimum EU tax rate on the profits of companies interesting in structuring within the EU, would partly offset the incentive for national tax legislators to (continue to) engage in a continuous lowering of the national corporate tax rates. As a consequence, the 3% “call rate” would also reduce the scope for tax avoidance strategies aimed at exploiting the differences in the effective tax rates between the various Member States (strategies aimed, e.g., at transferring the tax residence from one Member State to another lower-tax Member State). In so doing, it would, ultimately, be complementary to the goals of the Anti-Tax Avoidance Directive¹⁵, with which, in turn, the CCCTB itself would need to be consistent, as stressed by the Commission¹⁶.

To effectively achieve these objectives, EUCIT would need to meet an essential condition: it should *not* be a tax which companies were incentivized to try to avoid. In fact, even if it were to apply in the form of a 3% call rate on the CCCTB¹⁷, it may potentially still be avoided by corporate groups, simply by planning their intra-group structures in such a way as not to meet the requirements for the proposed mandatory application of the CCCTB¹⁸. Arguably, the higher the extent to which EUCIT would be perceived as a “fair tax”, the lower the risk of these tax avoidance strategies.

The need for this perception is particularly important as a long-term future of the EU project can be ensured to a higher extent, the higher the extent to which citizens and businesses in all Member State consider EU initiatives to be fair and thus acceptable ones. This condition arguably applies irrespective of whether the tax is expressly named “EUCIT” or “3% call rate applied to the new Common Consolidated Corporate Tax Base”.

In the original blueprint, the EUCIT was regarded as accruing, in principle, only to the EU budget, as one of the EU revenue resources, and not to Member States¹⁹; Member States would only get the part of the EUCIT proceeds exceeding the budgetary needs of the EU²⁰. It was asserted that the redistribution of this surplus amongst the Member States would not take place in proportion to the taxable profits having their source in each State, on the ground that this would reintroduce the “separate entity” approach (i.e., the approach of considering the individual units of a single economic group as if they were independent enterprises) which the EUCIT scheme should overcome²¹. A “formulary criteria” was suggested, based on a

¹⁴ H. van der Hurk, *Starbucks versus the People*, Bulletin for International Taxation, 64, 2014, 27-34

¹⁵ Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practice that directly affect the functioning of the internal market, in OJ L 193, 19.7.2016

¹⁶ COM(2016) 683 final, cit., pp. 3-4

¹⁷ As in the Commission’s proposal for the 2021 – 2027 budget; retro, note 14

¹⁸ Requirements indicated in COM(2016) 683 final, cit., Art. 5

¹⁹ S.Plasschaert, *The EU consolidated income tax revisited*, CESifo Working Paper No. 670 (1), February 2002, at 14.

²⁰ Id.

²¹ Id.

“horizontal allocation key” at “macro-level”, such as the GDPs of different Member States or the GNP values²².

However, an attempt to rethink the EUCIT suggestion, and to re-propose it as a “fair tax”, should try to reconcile the need for greater EU fiscal autonomy through a new “own resource” with commonly perceived criteria of “fairness”. The design of the EUCIT would thus need to identify the criteria for “fairness”, and to be inspired by tax policy objectives relating to the proper functioning of the single market as well as to the achievement of the wider EU’s objectives listed in Art. 3(1) and 3(3) of the Treaty on the European Union (TEU). These objectives, by including the “well-being of its people”, include, by definition, shareholders of companies and therefore, indirectly, suppose a fair company taxation too.

The European Commission, in its 2015 Action Plan for a Fair and Efficient Corporate Tax System (APFECTS), stressed that its long-term goal consists of introducing a mandatory CCCTB, and set out shorter term initiatives intended to generate revenue stability for Member States²³. In essence, these initiatives aim at ensuring *effective taxation* in the EU, intended as meaning that companies *should pay a fair share of tax in the countries where they make their profits*, and at increasing *transparency* of multinationals’ tax affairs towards tax authorities, as well as between tax authorities themselves, both within the EU and toward third countries. The initiatives set out there are based on the persistence of national corporate income taxes; the only two criteria for “fairness” contained in the APFECTS were to be the link between taxation and where the profits are generated, and transparency.

Although the APFECTS was seemingly focused only on such concept of fairness, this appears to be justified given that the Commission – in the APFECTS - did not propose a more far-reaching objective, such as the introduction of an EU tax for allowing the EU to have an additional “own resource” and, as a result, greater fiscal autonomy.

However, when such a (more ambitious) objective is considered and “fairness” relates to the design of a new tax aimed at this objective, it becomes necessary to identify the criteria for “fairness”, a concept which in the taxation area has an economical, juridical, philosophical and juridical perspective on which, on the whole, more research would be needed²⁴. For the purpose of defining “fairness” for the “3% call rate”, given that this form of EUCIT would need to be perceived as “fair” by corporate taxpayers throughout the EU, the *economic perspective of fairness from taxpayers’ viewpoint* should be adopted, which ultimately trace back to the well-known “Canons of taxation”²⁵:

-*equity*, whereby taxpayers should pay tax to the jurisdiction which allows them to earn their income, and whereby taxpayers should receive equal treatment when they are in the same circumstances (*horizontal equity*) and should pay higher taxes the higher their ability-to-pay (*vertical equity*);

²² Id, at 15.

²³ COM(2015)302 final, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, at p. 9.

²⁴ I.J.J. Burgers, I.J. Mosquera Valderrama, *Fairness: A Dire International Tax Standards with No Meaning ?* 45 Intertax, Issue 12, 2017, at 767, 782

²⁵ Which, in their essence, were elaborated ever since 1776 by A. Smith in its landmark “Wealth of nations”, Book V, Chapter 2.

-*neutrality*, whereby taxes should not influence economic decisions and the consequent allocation of resources;

-*certainty*, whereby the time, the manner and the amount of payment ought to be clear to the taxpayer,

-*convenience*, whereby every tax (thus, including company tax) should be levied in a way which is most convenient for the taxpayer to pay it.

In its 2004 working paper, the Commission considered, in its assessment, a range of criteria, going even beyond fairness: *budgetary criteria*, in terms of sufficiency (whether the revenues of EUCIT would be sufficient to cover the expenditures of the EU in the long-term) and stability (whether the tax would bring about stable revenues to the EU budget) of the tax, i.e. ; *efficiency criteria*, in terms of visibility (whether the EU tax would be visible for EU citizens), of low operating costs (whether the tax would be simple to administer and would involve low compliance costs), of efficient allocation of resources (whether the tax would lead to an efficient allocation of resources within the EU); *equity criteria*, in terms of fair contributions (whether the EU tax would raise revenue in Member States in line with their economic development), horizontal equity and vertical equity²⁶. In the Commission's working paper, the assessment criteria most closely related to fairness, i.e. horizontal equity and vertical equity, were defined in terms of whether the tax would have equivalent impact on equivalent taxpayers across the EU (*horizontal equity*) and in terms of whether the tax would involve income redistribution (*vertical equity*). The working paper noted that horizontal equity would be fully respected as companies subject to EUCIT would face a common compulsory set of rules, but that it would be difficult to assess whether or not vertical equity would also be achieved, as the effect of corporate income taxation on redistribution within the EU could not be easily assessed²⁷.

Evidently, the criteria of equity, neutrality, certainty and convenience – as defined above in accordance with the “Canons of Taxation” - partly overlap with the ones used by the Commission's working paper, which is the case for the *horizontal equity* and for *efficiency* in terms of low compliance costs. In the following analysis, the aspect of the new EUCIT version (3% call rate on the CCCTB), that would also be relevant under the criteria used in the 2004 working paper, will thus be highlighted.

3.The 3% “call rate” as partially meeting the equity criteria

3.1.Equity in the allocation of taxing rights: the relation between contribution to the generation of profits and taxing rights

A first aspect of the *equity* perspective consists of allocating taxing rights: if the contribution of a given country to the *generation of profits* is the criteria for allocation of taxing rights, it follows that only jurisdictions where profits are generated should have taxing rights.

²⁶ European Commission, Taxation Papers, P.Cattoir, *Tax-based EU own resources: An assessment*, at 12-13, and 14-20.

²⁷ *Id.*, at 19

The classic notion of inter-nation equity²⁸ requires an equitable division of international tax revenues between the countries which are involved in generating international income. It is coupled with the concept of “economic allegiance”, whereby a non-resident enterprise, which is integrated into the economic life of the host state, enjoys the (general and specific) benefits provided by this country, which latter should thus have taxing rights as a compensation for the costs it incurred in contributing to generating the income²⁹. On the bases of these principles, it was argued by academic Authors that equity and efficiency considerations, as a rule, support *exclusive* taxation in the source country³⁰. In light of the fact that the EU is not a state, but is a *sui generis* supranational legal order which has the ultimate purpose of allowing socio-economic integration between Member States, and which confers individuals and companies from Member States specific rights, these classic principles would need to be adapted to the *reality* of the EU. This is necessary to identify *when* the EU can be seen as contributing to the generation of corporate income and *when*, as a result, a company can be considered as having “economic allegiance” with the EU.

In previous analysis about the EUCIT, it was argued that - because a corporate income tax is levied both on pure profits (i.e., any profit exceeding the normal return to equity capital) and on the return on capital (i.e., on equity), which capital can be found in financial markets - the transfer of taxing rights to the EU should be ruled out for small and medium enterprises (SMEs), and could not be optimal for larger enterprises too³¹. According to that reasoning, in case of SMEs, European financial markets are not really accessible for equity finance, and in many cases these businesses rely on single family ownership with debts finance from the local banking sector³². In the case of larger businesses - which have access to European equity capital markets – it was submitted that the EU, if allowed to set corporate tax rates, would either replicate the rates chosen by individual Member State or set a single tax rate that would be an average of national corporate tax rates, which latter, however, would be sub-optimally low for some countries and sub-optimally high for other countries³³. In essence, according to this line of reasoning, the EU can be seen as contributing to the generation of corporate income when the company has access to European equity capital markets, so that there would be no scope for an EUCIT in case of SMEs. Moreover, even when companies can resort to European financial markets, there would be no reason for transferring taxing rights to the EU if this would result either the EU replicating national corporate tax rates or in the EU setting a suboptimal rate. Nonetheless, these arguments were formulated without the objective, indicated by the Commission in its budget proposal for 2021-2027, to create a new “own resource” (and thus, impliedly, to increase EU fiscal autonomy). On the other hand, if the contribution to the generation of corporate income were measured in terms of access to equity capital markets, even national corporate income tax would be difficult to justify in case of many SMEs, which

²⁸ P.B.Musgrave, *Taxation of Foreign Investment Income – An Economic Analysis*, 1963, 15-24 (John Hopkins Press); N.Kaufmann, *Fairness and the Taxation of International Income*, 29-2 *Law and Policy in International Business*, 1998, 145-203, 153; E.Escribano Lopez, *An Opportunistic, and yet Appropriate, Revision of the Source Threshold for the Twenty-First Century Tax Treaties*, 43 *Intertax* 1, 2015, 6-13, 7

²⁹ E.Escribano Lopez, *An Opportunistic, and yet Appropriate, Revision of the Source Threshold for the Twenty-First Century Tax Treaties*, cit., 7.

³⁰ K.Vogel, *Worldwide vs. source taxation of income – A review and re-evaluation of arguments*, 16 *Intertax*, No. 8/9, 1988

³¹ M.Lang and M.Zagler, *The case for and against an EU tax*, in *International Tax Coordination an interdisciplinary perspective on virtues and pitfalls*, 2010, 148, 158

³² *Id*

³³ *Id*

rely on family ownership and on borrowing from local banking sector, and which do not access national equity capital markets either.

Consequently, whereas access to European equity capital markets may be a measure of the contribution offered by the EU to the generation of corporate profits, particularly in case of large businesses, another criteria would be necessary for establishing whether the EU contributes to corporate income and would deserve to have taxing rights under *the equity perspective*. The main criteria for such an assessment can arguably lie in the concrete exercise of fundamental freedoms granted by EU law (the free movement of goods, persons, services and capitals), which can contribute to corporate profitability even for those businesses which do not access national or European equity capital markets.

The first implication of the equity principle, in the design of a EUCIT, is that this potential new tax, levied at EU level, should not apply to companies earning their profits solely within a single Member State (i.e. to companies which carry out their activity in terms of production of goods or services only within a single State and whose customer base is located only in that State). In fact, the “economic allegiance” of these companies lies only in that State, which is the only one contributing to generate their profits. This holds true irrespective of whether the ultimate generator of profits is considered to lie in the carrying out of the business activity in terms of production of goods or services – as in the classic concept of “economic allegiance”, and as it appears to be in the European Commission’s conception emerging from the APFECTS³⁴ - or in the sale of the goods or services, as it should be according to the academic proposals for a “destination-based corporation tax” (DBCT)³⁵ and for a “corporate tax2”³⁶.

Accordingly, the EUCIT could mandatorily apply only to companies *deriving benefits from the EU single market and earning profits in two or more Member States*, due to the access to the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union (TFEU). In fact, under the equity aspect here under consideration – i.e., the relation between contribution to the generation of profits and taxing powers - only for those companies the EU provides a legal framework *actually contributing* to their activity in a single market without internal frontiers. This contribution is evident to the extent that the companies at stake, based in a Member State, in addition to carrying out their activity there, have exercised the freedom of establishment in another Member State under Art. 49 and 54 of the TFEU, by achieving a genuine economic integration into the territory of that other State³⁷ through a local subsidiary or branch carrying on their activity of production of goods and services there, and having there (part of) its market base. In such case, when the business activity of the group as an economic unit is carried out in more Member States and sales destination markets exist in all of them, the equity perspective suggests that the EU would have legitimacy to tax the profits of the group due to its *distinctive legal order* allowing the companies at stake the use the fundamental freedoms, whereas each jurisdiction where the activity is being carried out and profits are being generated would also have legitimacy as a territorial source of a fraction of the overall profit.

³⁴ COM(2015)302 final, cit., at p. 9; COM(2016). 23/2, cit., at p. 4

³⁵ M. Devereux, R. de la Feria, *Designing and Implementing a destination-based corporation tax*, WP 14/07, May 2014, which developed earlier suggestions.

³⁶ M. de Wilde, ‘*Sharing the Pie*’: *Taxing Multinationals in a Global Market*, in 43 Intertax, vol. 6 and 7, 2015, 438-446.

³⁷ Which is the purpose of the freedom of establishment, as clarified by the ECJ case-law: Case C-196/04, *Cadbury Schweppes*, [2006] ECR I-7995 para. 54

Consequently, the proposed “3% call rate” on the CCCTB would be fully consistent, just as the CCCTB itself – with whom it would co-exist³⁸ - with the equity perspective in terms of legitimacy of taxation justified by the contribution to the generation of the overall profits. More specifically, given that both the 3% call rate and the CCCTB would obviously apply to companies who have exercised the freedom of establishment by creating subsidiaries and/or branches through the EU³⁹, both the 3% call rate and the CCCTB would be justified by the contribution to the generation of profits offered by the EU legal order and by each Member State concerned. The CCCTB, through its formulary apportionment - whereby the consolidated corporate tax base would be shared amongst Member States where the group operates, and which according to the Commission should be based on the three equally weighted factors consisting of labor, assets and sales⁴⁰ - would reflect the contribution of each jurisdiction to the generation of the overall profits of a group within the EU, by allocating its jurisdiction a share of the overall tax base on which each Member State would apply its national tax rate. The “3% call rate”, in turn, would reflect the distinctive contribution of the EU legal order.

This approach would mark a first significant innovation in comparison with the EUCIT hypothesis assessed by the 2004 Commission working paper, which took into consideration the case of EUCIT applying to specific groups of companies, defined by their own features - such as e.g. being quoted in a stock exchange, or having a turnover above certain thresholds - irrespective of the exercise of fundamental freedoms⁴¹.

However, the equity perspective should also be applied in the different situation of companies which carry on their business activity – in terms of production of goods and services – only in a Member State, but sell in other Member States too and enjoy the free movement of goods (or of services) guaranteed by the TFEU.

In this different situation, whether or not the EUCIT should apply depends on whether sales are considered to be the ultimate generator of business profits⁴² or whether the carrying out of the productive activity is regarded as the ultimate generator.

In the first case, the EU legal framework (by allowing free and unrestricted access to customers in other Member States) gives a distinctive contribution to the generation of profits, although to a minor extent than in the case of exercise of both the freedom of establishment and the free movement of goods. Specifically, even in case of companies using only the free movement of goods (or the free movement of services) and enjoying full, unrestricted access to customers in other Member States, the contribution to the generation of profits offered by the EU can be recognized if one takes the view that sales are the ultimate generator of business profits. This realization implies that such companies too should be subject to EUCIT and that

³⁸ Retro, 1.

³⁹ I.e., in the wording of the proposal for a CCCTB Directive, COM(2016) 683 final, to “Companies which seek to do business across frontiers within the Union..”

⁴⁰ COM(2016) 683 final, cit., Art. 28. According to amendments proposed by the European Parliament, the allocation formula would be composed of four factors, i.e. it would include, in addition to labor, assets and sales by destination, the “collection and use of personal data of online platform and services users” (data factor): European Parliament Legislative Resolution of 15.03.2018 on the proposal for a Council Directive on the Common Consolidated Corporate Tax Base, cit., Amendment 10.

⁴¹ European Commission, Taxation Papers, P.Cattoir, *Tax-based EU own resources: An assessment*, cit., at 17

⁴² As they are according to M. Devereux, R. de la Feria, *Designing and Implementing a destination-based corporation tax*, cit., at 11.

the “3% call rate” – due to its applying only to companies subject to the CCCTB (and which therefore have exercised the freedom of establishment, rather than benefiting only from the free movement of goods and/or services) - would fail to meet the equity criteria *if applied only to companies who have exercised the freedom of establishment*, which would be the case if the CCCTB were to apply only to companies having, within the EU, subsidiaries and permanent establishments.

In other words, it would fail to reflect the contribution that the use of the free movement of goods or services allowed by the EU legal order gives to business profits. Moreover, if sales are taken as the key generator of profits, one might submit that, due to the Free Trade Agreements (FTAs) entered into between the EU and third countries worldwide, the EU also contributes to profits arising out of sales in third countries with whom it has entered into FTAs, and the “3% call rate” would be inconsistent for these companies too with the equity perspective.

On the contrary, if taking the view that the key generator of profits lies in the carrying out of the business activity in terms of production of goods and/or services, the contribution of the profits of these companies would be offered by the concerned Member State only, and they should not fall within the scope of EUCIT. In this second case, the “3% call rate” would be consistent with the equity perspective even if applied only to companies exercising only the freedom of establishment.

As regards the scope of application of the 3% call rate, which would obviously depend on the scope of application of the CCCTB, it must nevertheless be noted that the latest European Parliament’s Resolution supporting the CCCTB⁴³ proposed to extend the concept of permanent establishment to include a “digital permanent establishment”⁴⁴, based on a “significant digital presence”⁴⁵. This proposed amendment, which would broaden the common tax base to profits arising out of digital sales without a physical presence, would obviously broaden the scope of application of the 3% call rate too, and would therefore *contribute, to a partial extent* – i.e., to an extent limited to sales of “digital goods” – *to allow the 3% call rate to meet the equity criteria* even in case of companies exercising only the free movement of goods and services.

Moreover, according to an academic proposal, a tax at EU level could be devised – unlike the “3% call rate” - for “residual profits” of *all* companies, i.e. for profits made in excess of the normal expected rate of return on equity investments⁴⁶, and which cannot be easily linked to the functions carried out within a multinational enterprise or easily allocated to different jurisdictions, i.e. for profits such as those deriving from the creation, management and exploitation of intellectual property. This idea was put forward on the ground that it is easier for Governments to tax normal profits of multinationals rather than residual profits⁴⁷. However, from an equity perspective - requiring a link between any taxing power conferred to the EU and any contribution given by the EU legal order to the generation of profits, to identify businesses subject to EUCIT – it would appear impossible to assert that the EU can contribute

⁴³ European Parliament Legislative Resolution of 15.03.2018 on the proposal for a Council Directive on the Common Consolidated Corporate Tax Base, cit.

⁴⁴ Id., Amendment 21

⁴⁵ Id., Amendment 9.

⁴⁶ J.W. Bellingwout, *Blueprint for a New Common Consolidated Corporate Tax Base*, European Taxation, 1/2015, at 4

⁴⁷ Id.

only to the generation of residual profits, especially in light of the fact that residual profits may also be made by companies not benefiting from fundamental freedoms.

3.2. Horizontal equity and vertical equity

In addition to the allocation of taxing rights on the bases of the contribution to the generation of profit, the equity perspective – through the concepts of *horizontal equity* and of *vertical equity* - generally indicates the bases on which the tax burden should be shared.

Whereas in the 2004 Commission working paper vertical equity was defined in terms of redistribution effect⁴⁸ (i.e. in terms of overall impact), reconsidering *vertical equity* in terms of tax liability connected with the ability-to-pay, in the design of EUCIT, would clearly mean that a company, or a corporate group as a *single economic unit*, is regarded as a taxpayer having an ability-to-pay on its own. According to the ability-to-pay principle, the higher the income of an individual or the profit of a company, the higher the tax that the (individual or corporate) taxpayer at stake should pay.

In the design of the CCCTB, it was suggested that the “ability-to-pay” principle could be relevant when considering whether or not unrealized profits should be taxable, and that the concept that higher profits should be taxable at higher rates is not usually applied to companies, except for some reliefs for small companies in some countries⁴⁹. Whilst in the context of the CCCTB design it could make sense to consider the ability-to-pay principle for assessing whether unrealized profits should be taxed or untaxed (due to CCCTB being concerned solely with the tax base), in the design of EUCIT nothing would prevent the application of a reduced tax rate for companies not exceeding certain threshold in terms of pre-tax profits, turnover, assets, etc.. On the contrary, to the extent that the application of a progressive corporate tax rate may increase the perception of fairness, it would make sense for EUCIT to be a progressive tax, with two corporate income tax brackets, rather than a proportional one as most national corporate income taxes actually are. This would be an important aspect linked to ability-to-pay, and another aspect would be the possibility of carrying forward the losses incurred in a tax year to reduce the tax base of future tax years. Consideration of the ability-to-pay, including the deductibility of losses, would certainly be consistent with the EU’s objective of pursuing the (economic) “well-being of its people”⁵⁰ (including people who invest in companies, and, arguably, including companies themselves as distinct taxpayers). The ability-to-pay principle has already been, from time to time, applied by the ECJ in its rulings concerning cross-border losses compensation, regarding companies too⁵¹; it would thus be consistent with the *acquis communautaire* for EUCIT to be designed in such a way as to respect this principle. The “3% call rate” would therefore, by definition, be inconsistent with the “ability-to-pay” aspect of the equity principle.

Furthermore, in the context of the equity perspective, the objective of creating a new “own resource” for the EU budget would arguably will need to be consistent with other EU policies,

⁴⁸ European Commission, Taxation Papers, P.Cattoir, *Tax-based EU own resources: An assessment*, cit., at 11.

⁴⁹ D.Pirvu, *Corporate Income Taxation in the European Union*, Palgrave MacMillan, 2012, Palgrave MacMillan Studies in Banking and Financial Institutions, at p. 109.

⁵⁰ Art. 3 Treaty on the European Union (TEU)

⁵¹ F.Vanistendael, *Ability to pay in European Community Law*, 23 EC Tax. Review, 2014, 121-134, at 134.

even beyond the taxation area, that the available resources allow the EU to pursue. In this regard, it can be noted that the Commission issued, since 2008, a Communication on a “small business act” (SBA) for European SMEs⁵², setting out a number of principles designed to encourage entrepreneurship in the EU, and to make it easier for small businesses to thrive. Two of the principles laid down in the SBA are the “think small first” principle, whereby rules should be designed in such a way as to promote entrepreneurship, and the help SMEs to benefit more from the opportunities offered by the EU’s single market. In pursuance of the goals set out in the SBA, the European Commission also runs a program for the Competitiveness of Enterprises and of Small and Medium Sized Enterprises (COSME), which supports SMEs wishing to internationalize their activities and helps SMEs to access finance under the forms of equity instrument and a Debt instrument Loan Guarantee Facility⁵³.

According to the Commission’s proposal, SMEs would not be obliged to adopt the CCCTB scheme, which would be mandatory only for groups exceeding an aggregate turnover of 750 million €⁵⁴. Conversely, according to the European Parliament’s position, this threshold should be abolished over a period of seven years⁵⁵. As a result, even without being obliged - or *for the initial period* during which they would not be obligated, if the position of the European Parliament were to be reflected in the final version of the CCCTB Directive - SMEs could opt for the CCCTB, and those SMEs opting for it would also fall within the scope of application of the “call rate” on the CCCTB. The “call rate” would also apply to all SMEs, within 7 years of the entry into force of the CCCTB Directive, if the position of the European Parliament were to be accepted by the Council.

As a result, the “call rate”, instead of being set at 3% for all businesses, could be reduced below 3% for SMEs. In fact, with regard to SMEs, designing a progressive tax structure, e.g. with a reduced rate applying below the turnover threshold that would trigger the compulsory application of CCCTB (during the first 7 years according to the European Parliament position) and the 3% rate applying above this threshold, would be entirely consistent with the principles laid down in a “soft-law” piece such as the SBA.

Given that some statistics indicate that 99% of all businesses within the EU are SMEs⁵⁶, designing a EUCIT (applicable to all SMEs that benefit from the single market, and) having a progressive rate structure, would be one of the routes to both encourage entrepreneurship and help them to benefit from the single market (i.e., to make attractive for them to exercise at least one of the fundamental freedoms). The higher the proportion of SMEs exercising a fundamental freedom, the higher would be the overall number of companies falling within the scope of EUCIT, and the higher the extent with an EUCIT with a reduced rate for SMEs could contribute to the EU budget as an “own resource”, even if in the form of a 3% “call rate”.

⁵² European Commission Communication (COM(2008) 394, “Think small first”-“A small business act” for Europe

⁵³ Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014 - 2020)

⁵⁴ COM(2016) 683 final, cit., Art. 4

⁵⁵ European Parliament Legislative Resolution of 15.03.2018 on the proposal for a Council Directive on the Common Consolidated Corporate Tax Base, cit., Amendment 5

⁵⁶ European Parliament, Small and Medium-Sized Enterprises, Fact Sheets on the European Union, 2016, http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.9.2.pdf

An issue which was discussed in literature is whether the EUCIT should apply in addition to national corporate taxes, as implied in the Commission's proposal for the 2021-2027 EU budget, or in replacement of them.

It was argued that, if EUCIT was made compulsory for all companies and was to replace national corporate income taxes, the effect on domestic tax policies of Member States would be dramatic, because most of the tax policy deliberations in Member States are concerned with the corporate income tax base and rate, and therefore such a move would touch the core of tax policy⁵⁷. Nonetheless, if EUCIT – in the specific case, in the form of a “3% call rate” - were to apply in addition to national corporate taxes, there would be the risk of double taxation by the Member States *and* by the EU on the same corporate profit. This double taxation which would not be relieved by the current bilateral conventions against double taxation (DTCs) based on the OECD Model Tax Convention⁵⁸, because these DTCs are entered into only between Member States. Neither would this double taxation be relieved by the application of the latest Directive on Tax Dispute Resolution Mechanisms⁵⁹, since this Directive aims at overcoming disputes resulting in double taxation by two Member States who have entered a DTCs⁶⁰ (not a double taxation by any Member State and by the EU). The absence of relief for this double taxation might deter companies from exercising fundamental freedoms, unless double taxation were eliminated by allowing the deduction of the “3% call rate” from the payable national corporate income tax deriving from the application of the national corporate tax rates to the allocated tax base share of the CCCTB.

Overall, it is thus submitted that the equity perspective, in the design of EUCIT – even if this tax were named “3% call rate” instead of EUCIT - would require: its application only to companies taking benefit from the EU's single market, given that the EU contributes to the profits of these companies; a progressive tax rate, with a reduced rate for SMEs consistently with the objectives set out in the SBA; the elimination of both international double taxation and international double non-taxation⁶¹, because both these phenomenon would contrast with the ability to pay principle.

The “3% call rate”, as proposed, would partly meet the equity criteria in terms of relation between EU taxing power and contribution to the generation of profits, but would need to be adjusted in terms of progressivity and in terms of elimination of double taxation that would otherwise be caused by the addition of the 3% rate to the tax liability resulting from national corporate tax rates applied to the CCCTB share. Conversely, the prevention of both international double taxation and international double non-taxation in the tax base would already be achieved by the CCCTB, due to the consolidation and the application of the apportionment formula which would allocate each Member State its specific share of the consolidated tax base. This aspect of fairness would be maintained by EUCIT.

⁵⁷ M.Lang and M.Zagler, *The case for and against an EU tax*, in International Tax Coordination an interdisciplinary perspective on virtues and pitfalls, 2010, 148, 156

⁵⁸ OECD Model Tax Convention on Income and on Capital, 2014, OECD Publishing

⁵⁹ Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanism in the European Union, OJ L 265, 14.10.2017, p. 1-14

⁶⁰ Id, Preamble, Recitals 2 and 7

⁶¹ A. Van de Vijver, *International Double (Non-) taxation: Comparative Guidance from European Legal Principles*, in EU tax review 5, 2015, 240, at 244 ss.

4. The failure to meet the neutrality criteria and the possible remedy

Neutrality – and thus the lack of influence on economic decisions within the single market, which was already advocated in 1992 by the Ruding Report⁶² - can, in turn, be achieved if the differences in corporate taxation regimes can no longer induce tax planning strategies and profit shifting, i.e. if the best location can be decided solely on an economic perspective. If one accepts that neutrality is achieved once the scope for tax planning strategies no longer exists, the design of an EUCIT capable of ensuring neutrality would need to ensure that the EUCIT does not leave scope for tax planning opportunities between the EUCIT regime and national corporate tax regimes, and that the EUCIT regime itself could not be circumvented. It was argued that, if only certain types of companies were covered, taxpayers could maneuver around the tax and integrate all their activities in one company, or split them up between different companies, depending on whichever route was more beneficial to them⁶³. It was also highlighted that, even if a EUCIT were made mandatory for all companies, taxpayers could change their legal form since, as long as there exist other entities which are treated as transparent and whose income is taxed in the hands of member or shareholders, taxpayers will always be able to switch from one legal form to another, and it would be rational for them to calculate whether it would be more convenient for them to be taxed under EUCIT, under partnership regime, or as sole entrepreneurs under the domestic personal income tax⁶⁴. On those grounds, it was ultimately asserted that a EUCIT might only make sense if accompanied by a general business tax that was applicable to sole entrepreneurs and partnerships too, and that led to the same burden as the EUCIT, which reform, however, would determine a dramatic change in national tax systems⁶⁵.

Those (well founded) arguments would indicate that the EUCIT could hardly achieve neutrality, but they were made on the assumption that the EUCIT would cover either some kinds of legal entities regarded as “companies” or all “companies”, and that in any case the businesses falling within its scope would have the legal form of companies. Nonetheless, from the equity perspective taken here, the design of EUCIT would take as a decisive element not the legal form, but the actual contribution that the EU would offer to the generation of profits by means of the exercise by the concerned taxpayers of at least one of the fundamental freedoms. As Art. 54 of the TFEU, concerning the freedom of establishment, which is the widest in its contents in terms of socio-economic interpenetration within the EU, contains a definition (of the beneficiaries of that freedom) including *all profits-making entities* under the notion of “companies or firms”⁶⁶, that definition would also identify the scope of EUCIT.

The name “European Union *Company* Income Tax” - and, to an even greater extent, the name “3% call rate” - would not prevent the EU measure introducing the tax from considering as equivalent to companies (for its purpose) businesses having other legal forms, including partnerships, *provided* they benefit from the fundamental freedoms. This rethinking of the coverage of EUCIT would leave *no scope for tax planning* strategies based on legal form

⁶² Report of the Committee of Independent Experts on business taxation (Ruding Report), SEC(92) 1118.

⁶³ M.Lang and M.Zagler, *The case for and against an EU tax*, cit., at 156

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Art. 54(2) TFEU

shopping: even partnerships treated as transparent under national law would fall within the coverage of EUCIT, starting from the tax year when they benefit from a fundamental freedom.

From the perspective of tax shopping based on the legal form, the “3% call rate” on the CCCTB would *fail to meet* the neutrality criteria, due to its applying only to entities having the legal forms set out in the proposed CCCTB Directive⁶⁷. Under the suggestion here formulated, a partnership profit would thus be taxed in the hands of its members, although the taxable income would be assessed at partnership level, for all tax years during which the partnership carries on its activity and sells its goods or services only within its domestic market. It would still be assessed at partnership level, but under the common EU rules, and would be taxed in the hands of the partnership itself, starting from the first tax year when the partnership exercises a fundamental freedom. In other words, the partnership would become an opaque entity for the purpose of the “3% call rate”, so that – in case of a partnership subject to EUCIT – income would be taxed in the hands of members only when distributed to members themselves. For Member States, there would be only one consequence: they would have to allow the EUCIT paid by the entity (of which they would receive a part of the revenues) to be credited against the personal income tax of its members. On the other hand, in the context of a EUCIT with a reduced tax rate for SMEs, partnerships (which, usually, are the legal form used by small businesses) would also fall within the scope of the reduced tax rate, consistently with the objective (set out in the SBA) of helping (all) SMEs to benefit from the single market. It would be necessary to ensure that no higher tax burden fall on partnerships (and their members) when exercising fundamental freedoms, in comparison with (members of) partnerships operating only within domestic markets.

An EU “call rate” with these features – i.e., a coverage including *all* profit-making entities benefiting from the single market, irrespective of the legal form - which would not leave scope for tax arbitrage based on the legal form, would be able to ensure greater stability as a new “own resource” to the EU budget than a “3% call rate” falling only on entities having the legal forms indicated in the draft CCCTB Directive⁶⁸.

5. The 3% call rate meeting the certainty criteria

Another important aspect of a fair tax, *certainty*, is necessary for taxpayers, who timely need to know the date(s), manner and amount of payment, and for tax administrations, who need to rely on revenue stability and prevent situations where uncertainty leads taxpayers to tax avoidance strategies. In conceiving a tax such as the 3% “call rate”, governed by newly introduced EU law provisions, this aspect of a fair tax would also need to be taken into account

⁶⁷ COM(2016) 683 final, cit., Art. 4

⁶⁸ Literature indicated remaining risks of manipulation of the elements of the CCCTB apportionment formula: R. Offermans, S. Huibregtse, L. Verdoner, J. Michalak, Bridging the CCCTB and the Arm’s Length Principle – A Value Chain Analysis Approach, 57 European Taxation 11, 2017, 466-480, at 472; M.F. de Wilde, Tax Competition within the European Union revisited – Is the relaunched CCCTB a Solution? July 1, 2017, available at SSRN: <https://ssrn.com/abstract=3040702>, and the cited European Parliament Resolution proposed amendments (such as the including of one more factor in the apportionment formula: see note 40) for the purposes of limiting this risk. This aspect, however, would concern only the distribution of the overall consolidated tax base between Member State, and would not affect the 3% call rate which would be applied to the entire CCCTB (irrespective of its apportionment) and would constitute a resource for the EU budget.

for reasons of consistency with the recognition, by the ECJ case-law, that legal certainty is one among the general principles of EU law⁶⁹.

Certainty can be achieved, on the one hand, by ensuring that the rules governing the EUCIT as regards both its features and the procedural aspects of its application are simple and clear ones. On the other hand, it can be achieved by ensuring a degree of cooperation between the different national tax authorities such as to avoid situations of uncertainties in all the phases concerning the assessment and the collection of the tax. As cooperation requires mutual transparency, transparency between tax authorities turns out being an important component of certainty,

The European Commission has already been undertaking initiatives aimed at strengthening the cooperation between tax authorities, in particular by promoting the automatic exchange of information and by proposing a “European Tax Identification Number” (European TIN) for taxpayers carrying out cross-border activities⁷⁰.

In a previous conception of EUCIT, literature assumed that the tax would be collected by the tax authorities of Member States, even if on behalf of European institutions⁷¹, and that it would also be audited at national level, with common standards of administration⁷². Consistently with this position, it was also argued that, if EUCIT was to be considered as levied by Member States (though for the EU), the existing double tax conventions (DTCs) between Member States would need to cover EUCIT too⁷³. In this backdrop, the coordination between tax authorities of Member States in interpreting and applying DTCs would be essential for giving taxpayers the certainty they would need as regards the time, manner and amount of payment of EUCIT (just as it is essential in the application of national taxes in cases of cross-border income). In fact, the differences in the interpretation and application of DTCs would hinder certainty as regards EUCIT too – again, irrespective of its new name as 3% “call rate” - if one accepts that even this tax would fall within the scope of DTCs. As a result of the 2013 OECD’s Action Plan against Base Erosion and Profit Shifting (BEPS)⁷⁴, measures have been identified to ensure that disputes among different countries regarding the interpretation of DTCs are resolved⁷⁵, minimizing the risk of uncertainty and of unintended double taxation⁷⁶. More importantly, should this tax fall within the scope of DTCs, corporate taxpayers could also rely on the application of the latest EU Directive on Tax Dispute Resolution Mechanisms⁷⁷ which provides for an even more effective framework for the resolution of disputes relating to the application of DTCs. Therefore, if the existing DTCs had to cover EUCIT too (as they should according to earlier suggestions), the standards for efficient and effective dispute

⁶⁹ E.g., ECJ, *France v. The EC Commission*; Case C-325/91 ECR [1993]; T.Ayhan, *The Principle of Legal Certainty in EU Case-Law*, in TODAÑE’s Review of Public Administration, Volume 4 No 3 September 2010, p.149-183, at 155 ss.

⁷⁰ European Commission, Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012)722, at 12.

⁷¹ M.Lang and M.Zagler, *The case for an EU tax*, cit., at 157

⁷² S.Plasschaert, *The EU consolidated income tax revisited*, cit., at 19.

⁷³ M.Lang and M.Zagler, *The case for an EU tax*, cit., at 157

⁷⁴ OECD/G20, 2013, *Action Plan on Base Erosion and Profit Shifting (BEPS)*

⁷⁵ OECD/G20 *Base Erosion and Profit Shifting Project, Making Dispute Resolution Mechanisms More Effective*, Action 14, 2015 Final Report, p. 13- 42

⁷⁶ P.Saint-Amand and R.Russo, *The BEPS Package: Promise Kept*, in Bulletin for International Taxation 4, 2016, 236, at 239.

⁷⁷ Directive 2017/1852, cit.

resolution mechanisms which have been agreed as a result of the BEPS Action Plan and of the Directive on Tax Dispute Resolution Mechanisms would also offer corporate taxpayers an increased certainty, for the purpose of EUCIT, for an *ex post* solution of tax disputes relating the application of this tax.

Nonetheless, after these earlier hypothesis about EUCIT, the draft CCCTB Directive went beyond the level of cooperation between national tax authorities that was implied in these suggestions and that is necessary for a smooth application of DTCs. In fact, DTCs as between Member States would no longer apply to companies falling within the CCCTB regime, due to the consolidation process⁷⁸. The scheme would work through a “one-stop-shop” system, in which one tax authority, the tax authority of the residence State of the parent company (principal tax authority, PTA), would be the one in charge of receiving consolidated tax returns for all the corporate group, of issuing amended assessments and of initiating tax audits⁷⁹. All information would be stored in a central database, and would be immediately accessible by each national tax authority⁸⁰. The CCCTB scheme would thus bring about a *multilateral sharing of information* as between national tax authorities. On the one hand, issues concerning the interpretation and application of the DTCs – instead of being effectively solved (*ex post*) as a consequence of measures taken in implementing the BEPS project - would be *ex ante* avoided. On the other hand, the multilateral sharing of information would be more effective than bilateral automatic transmission of information, given that it would allow tax authorities simultaneous access to information, and would thus allow them an *ex ante* overcoming of any potential dispute (rather than an *ex post* effective settlement), to the benefit of certainty for the concerned taxpayers.

Accordingly, because the “3% call rate” would be applied on the CCCTB, the advantages deriving from the one-stop-shop model, that would be introduced by the CCCTB, would need to apply to the 3% call rate too. Instead of relying on the measures taken to solve *ex post* tax disputes between *different* national tax authorities on the application of DTCs, and of running the risk of uncertainty pending the possible disputes on the application of DTCs, the concerned taxpayers could find certainty ensured to an even higher degree if the 3% call rate was administered through a “one-stop-shop” system, i.e. if the companies could interact only with *one* tax authority with regard to time, manner and amount of payment, and could file only one tax return. In other words, subject to this condition, the 3% “call rate” would meet the certainty criteria, contrary to the previous suggestion that were made about the EUCIT.

Moreover, if the European TIN, which the Commission has proposed, would be useful in identifying businesses subject to EUCIT, each of which would have the European TIN instead of the national tax identification number. The reduction in administrative costs, and the compliance simplification, would be greatly beneficial especially for SMEs, and therefore would be, again, fully consistent with the objectives of the SBA in terms of facilitating this category of businesses in enjoying the benefits of the single market. The one-stop-shop aspect, in addition to helping the certainty in terms of meeting tax obligations relating to the 3% “call rate”, would also need to meet one last benchmark for fairness, i.e. convenience as meaning

⁷⁸ COM(2016) 683 final, cit. Chapter VIII

⁷⁹ Id., Art. 51, 53, 54, 56 and 64

⁸⁰ Id., Art. 57

that the 3% call rate should be levied in a manner which is most convenient for settling the final tax liability resulting from it.

6. A reallocation of the “one-stop-shop” role as a condition for meeting the convenience criteria

Convenience – as in the case of the CCCTB - would be achieved, undoubtedly, by the existence of a “one-stop-shop”, which would avoid the need for the concerned taxpayers to deal with several different national tax administrations. However, in the CCCTB proposal, where a national PTA would act as a “one-stop-shop” for the fulfillment of all group’s tax related obligations, there would be the risk of tensions as between national tax authorities. As the PTA would be in charge of administering the CCCTB scheme, by deciding e.g. on the issue of amended assessments⁸¹ or the undertaking of audits⁸², any decision taken by the PTA as regards the CCCTB scheme in the concrete case would also, by definition, affect the application of the 3% “call rate”. Any disagreement between the PTA and other tax authorities concerning the CCCTB, in the event of litigation, would also adversely impact the application of the 3% call rate, due to (this tax using the CCCTB as its own taxable base and as a result, due to) the position of a corporate taxpayer ending up being dependent on the outcome of the litigation.

Moreover, tax authorities of residence states of other group companies, if in disagreement with decisions of the PTA, should appeal before a court of the Member State of the PTA and enjoy at least the same rights as taxpayers of this State⁸³. Nonetheless, a different degree of taxpayers’ procedural rights protection in different Member States could result in *lack of reciprocity* as regards the rights of complaining tax authorities, and in consequent tensions between the different national tax authorities. From the taxpayer’s viewpoint, the risk of (lack of effective collaboration and of) litigations between different national tax authorities – each one with *different* views about its own tax position - could risk reducing the advantages brought by the *one-stop-shop* in terms of convenience in meeting the compliance obligations regarding both the CCCTB and the 3% call rate. According to the litigation outcome, there could be instances where the payment initially made by a taxpayer belonging to a CCCTB group – on the bases of its tax liability as resulting from the consolidated tax return - would *ex post* turn out being not properly determined (which case would certainly reduce the convenience of the one-stop-shop modality from taxpayers’ viewpoint, apart from reducing *ex post* the certainty as well).

A further aspect may arise and be detrimental from the convenience perspective, given that the smooth administrative working of the CCCTB scheme supposes the easy identification of the Member State of tax residence of the parent company, whose tax authority would be the PTA. The draft CCCTB Directive makes it clear that, in case of dual tax residence under domestic law, the parent company would be tax resident of the jurisdiction where its “place of effective management” (POEM) were located⁸⁴. Nevertheless, literature already highlighted that POEM – which has long been serving as a tie-breaker rule for allocating corporate tax

⁸¹ Art. 51, 53, 54, 56

⁸² Id., Art. 64

⁸³ Id., Art. 65

⁸⁴ Id. Art. 4(2).

residence under Art. 4(3) of the DTCs based on the OECD Model - risk being ineffective as a “tie-breaker” in a computerized environment⁸⁵, where top management functions can well be decentralized through electronic communication means. Identifying the location of the POEM can be difficult in case of companies whose directors live in different jurisdiction and, instead of physically meeting in a specific location, take decisions through distance communications via electronic means. Even the OECD – after realizing since the start of the century that the new communication technologies could raise a challenge for the application of the POEM criteria as a “tie-breaker” rule for corporate tax residence⁸⁶ - eventually changed the formulation of Art. 4(3) of its Model Tax Convention, by adopting in the latest (2017) version, the “mutual agreement” as a new criteria for overcoming double tax residence cases⁸⁷, due to a number of tax avoidance cases involved dual resident companies⁸⁸. In the OECD Model, the POEM – whilst being replaced as a tie-breaker criteria – has been turned into one of the criteria to be considered by tax authorities in *endeavoring* to reach an agreement on the location of corporate tax residence⁸⁹. The draft CCCTB Directive, by keeping the POEM as a tie-breaker criteria, and the Resolution of the European Parliament⁹⁰, by not recommending amendments in this respect, appear to have supposed that the identification of PEOM in the concrete cases would never be difficult and that the reasons underlying the change in the OECD Model would be irrelevant for the CCCTB.

To avoid shortcomings such as the risk of litigation between tax authorities and/or cases of difficulties in identifying the POEM, which would adversely affect the application of the 3% call rate as well as of the CCCTB itself, the suggestion of introducing the 3% call rate could provide the occasion to reconsider the allocation of the “one-stop-shop” role.

Specifically, the “one-stop-shop in charge for administration of the “3% call rate” and of the CCCTB itself should *not be* a national tax authority, but a newly set up EU tax office – a “*European One-Stop-Shop*” (EOSS) - which could be composed of permanent representatives of all national tax authorities, with each national tax authority seconding its own representative in the EOSS. In an earlier suggestion about the EUCIT, whilst arguing that the tax should be audited at national level, it was already admitted that “entrusting the administration to an EU-corps of officials would ensure an even-handed application to all taxpayers covered by the scheme”⁹¹. Arguably, this suggestion could be borrowed for the “one-stop-shop” administering the 3% call rate; in particular, the EOSS could act as an “EU corps of officials” in administering the 3% call rate whilst representing – at the same time – *all* concerned national tax authorities for the administration of the CCCTB scheme.

⁸⁵ D. Pinto, *Exclusive source or residence-based taxation-is a new and simpler world tax order possible?* Bulletin for International Taxation 61 (2007), 277-291, at 281.

⁸⁶ OECD (2001), *The Impact of the Communication Revolution on the application of Place of Effective Management as a Tiebreaker Rule*, Discussion Paper for from the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits, at 11-12

⁸⁷ OECD (2017), *Model Tax Convention on Income and Capital Condensed Version* (as it reads on 21 November 2017), Art. 4(3).

⁸⁸ *Id.*, Commentary to Art. 4 of the OECD Model, para. 23 and 24.

⁸⁹ *Id.*, note 82

⁹⁰ European Parliament Legislative Resolution of 15.03.2018 on the proposal for a Council Directive on the Common Consolidated Corporate Tax Base, cit.

⁹¹ S.Plasschaert, *The EU consolidated income tax revisited*, cit., at 18

There are already, on a continental scale, inter-governmental organizations that regroup tax authorities of Member States (and of third countries) and encourage cooperation amongst these national tax authorities. Typically, these inter-governmental organizations provide forums to assist their members in improving tax administration through the exchange of views, experiences and best practices: e.g., the Intra-European Organization of Tax Administrations (IOTA), which has 46 member tax authorities, the Inter-American Centre of Tax Administration (CIAT) and the African Tax Administration Forum (ATAF). At OECD level, in the context of the global fight against tax avoidance, a network – the Joint International Tax Shelter Information & Collaboration (JITSIC) – was created to enable its members (36 national tax administrations) to actively collaborate, within the legal framework of current DTCs and tax information exchange agreements, by sharing experiences, resources and best practices to tackle the issues they face in common. At EU level, in addition to this form of cooperation between national tax authorities via inter-governmental organizations, a significant step was taken through the establishment and the operation of the Joint Transfer Pricing Forum (JTPF), composed of one representative of each Member State, with expertise on transfer pricing, which - after having been informally set up in 2002, and formally constituted in 2007⁹² - has been providing an institutionalized platform for permanent cooperation.

Given these pre-existing experiences, the setting up of the EOSS would merely extend the scope for permanent cooperation between tax authorities of Member States, to include the joint administration of the 3% call rate through a permanent group of permanent representatives of each national tax authority, and to improve the working of the CCCTB scheme administration.

In fact, any disagreement between national tax authorities would need to be settled *within* the EOSS *before* the issuance, by the EOSS itself, of any act (e.g., reassessments) affecting the corporate taxpayers' position. Consequently, for this aspect too, the EOSS - which should be the only authority in charge of collecting the 3% "call rate" for the EU budget, even if the tax amount resulting from the application of the national corporate tax rates on each EU jurisdictions' share of the CCCTB would be collected by national tax authorities – could work more effectively, in the "one-stop-shop" role, than a national tax authority.

For the concerned companies, for the purpose of the 3% "call rate", it would certainly be more convenient to send, each year, a single tax return and to make the payment only to the EOSS, rather than complying with its obligations through a national PTA whose decisions could be opposed by other concerned national tax authorities via *ex post* litigation (which could impact the taxpayer's own position). This possibility - for companies subject to EUCIT - of meeting tax obligations through the EOSS, and the prospect for national tax authorities to remain in charge *only* of collection of national corporate income taxes (due to the administration of 3% "call rate" being conferred to the EOSS), would be further significant innovations in comparison with the EUCIT hypothesis that was considered in the 2004 Commission's working paper. In this document, it was in fact assumed that companies subject to EUCIT, although submitting only one tax form, would still deal with national tax authorities, and that national tax authorities would have to manage the EUCIT system in parallel with national corporate tax systems⁹³.

⁹² Commission decision of 22 December 2006 setting up an expert group on transfer pricing, 2007/75/EC, in OJ L 32/189

⁹³ European Commission, Taxation Papers, P.Cattoir, *Tax-based EU own resources: An assessment*, cit., at 19.

Conclusion

In light of the foregoing, it can be concluded that the 3% “call rate” applied on the CCCTB would meet only in part the benchmarks for a “fair tax”, and that the design of this new tax as a new form of EUCIT – although without the EUCIT name – would need to be revisited to fully meet these benchmarks. Specifically, it can be concluded that, to meet the benchmarks of equity, neutrality, certainty and convenience, the 3% “call rate” would need: to apply *only to companies concretely exercising the fundamental freedoms*, a criteria which it would partially meet due to its applying on the CCCTB, but which it would partly fail ; to be *neutral* as regards the legal form, a criteria which it would fail to meet due to not applying to those entities having legal forms not included in the scope of the CCCTB; to offer *certainty* in its application, a criteria that it would meet thanks to the “one-stop-shop”, to have a *convenient* application, a criteria that it would partly risk failing to meet if the role of “one-stop-shop” were left to a national tax authority instead of being entrusted to a newly set-up EOSS.

Ultimately, a EUCIT (3% call rate) administered by a EOSS regime and meeting all other criteria for “fair taxation” would work more effectively as a new “own resource”, i.e. as a step toward a greater fiscal EU autonomy. In turn, a degree of EU fiscal autonomy in the direct taxation area could contribute to a gradual federalist evolution of the European project⁹⁴, apart from being compatible with the role of the European Parliament (which has endorsed the CCCTB) as a body representative of EU citizens. This role, by reading *a contrario* the classic statement “no taxation without representation”, would already be able, at least theoretically, to justify some EU taxing power in the (politically sensitive) area of corporate direct taxation as well.

An EU taxing power in the area of direct taxation through a EUCIT that would include within their scope *only* companies actually drawing the *most tangible benefits* from the EU legal order, may also be able to increase in the public opinion the perception of fairness of EU decisions, which appears to be important particularly in the current historical time. It may, consequently, be able to help the European project “to achieve more than consolidation of past goods”⁹⁵.

⁹⁴ L.Hinneken, *Story and Fundamentals of Direct Taxation at Work in the EU*, in EC Tax Review 3, 2012, at 37 ss.

⁹⁵ N.Walker, *The European Fallout*, German Law Journal, 17, 2016, pp. 125-129 , at 128